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No. 93-1841

IN THE

Supreme Court Of The United States

October Term, 1994

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

FEDERICO PENA, Secretary of Transportation, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF AMICUS CURIAE OF THE CONGRESSIONAL BLACK CAUCUS IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE OF THE CONGRESSIONAL BLACK CAUCUS IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

The Congressional Black Caucus ("CBC") submits this brief as amicus curiae, pursuant to Rule 37 of the Rules of this Court, in support of respondents Federico Pena, Secretary of Transportation, et al., urging affirmance of the decision of the United States Court of Appeals for the Tenth Circuit in *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir. 1993). This brief is filed upon the written consent of all parties, copies of which are lodged with the Clerk.

The CBC was formed in 1970 when thirteen African American members of the U.S. House of Representatives joined together to strengthen their efforts to address the legislative concerns of African American and minority citizens. The vision

and goals of the original thirteen members, "to promote the public welfare through legislation designed to meet the needs of millions of neglected citizens," has been reaffirmed through the legislative and political successes of the CBC. The CBC currently has thirty-nine members and is involved in legislative initiatives ranging from full employment, welfare reform, South African apartheid and international human rights, to minority business development and expanded educational opportunity. The CBC and its members have been major proponents and sponsors of the Congressional legislation at issue in this case.

SUMMARY OF THE ARGUMENT

In the decision below, the court of appeals upheld the constitutionality of the subcontracting compensation clause ("SCC") adopted by the Central Federal Lands Highway Division ("CFLHD") acting pursuant to the requirement of the Small Business Act to make subcontracting opportunities available for small business concerns owned by socially and economically disadvantaged individuals. Pub. L. No. 100-656, 102 Stat. 3853 (codified at 15 U.S.C. 644(g) (Supp. 1994)). This decision should be affirmed based upon this Court's prior decisions in *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

Section 502 is a valid exercise of Congress' unique and broad amalgam of powers under the Spending Power, U.S. Const. art. I, § 8, cl. 1; the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3; and the Due Process Clause of the Fifth Amendment, U.S. Const., amend. V. Congress recognized two fundamental principles in adopting Section 502, which is an integral part of the Small Business Act's small business development program. First, at some time after the year 2010, the majority of the population of the United States will be comprised of racial and ethnic minorities and otherwise disadvantaged individuals. If this nation is to prosper economically, these individuals must

soon be brought into the economic mainstream. Second, although this country's guiding principle is, and should remain, that all persons are created equal, this goal cannot be reached solely through the enactment of color-blind legislation or by ignoring the serious racial issues that historically have confronted the United States and that continue to plague it today.

Race has always been, and remains to be, this country's most vexing problem. Severe disparities in wealth along racial lines, resulting from historical discrimination in employment, education, housing, lending, contracting and virtually every aspect of American life, only serve to reinforce and perpetuate negative racial stereotypes and racial polarization. The Petitioner and its supporters attempt to use noble phrases to achieve a result which would be at best ignoble, and at worst destructive not only of this nation's economy, but also of this country's ongoing attempts to reach an era of true equality among the races and inclusion of the disadvantaged. Simply stating that this society is now color-blind will not make it a reality. Congress has long recognized that affirmative action is required to address persistent and pernicious imbalances that have been borne through generations of invidious discrimination.

The Constitution has never been color-blind. Initially, African Americans were considered to be three-fifths of a person, and in the *Dred Scott* case, African Americans were deemed not to be citizens of this country and to have no rights. *Dred Scott v. Sanford*, 60 U.S. (19 Howard) 393 (1857). This case was never overruled but instead was made moot by a Civil War and the passage of the Thirteenth, Fourteenth and Fifteenth Amendments. Unfortunately, in *Plessy v. Ferguson*, 163 U.S. 537 (1896), this Court backed away from fundamental principles and the nation suffered for many years. A similar result should be avoided in this case.

Strict scrutiny is not appropriate in this case. Congress' objectives in adopting Section 502 were clear: to promote the

general welfare and commerce through the inclusion of disadvantaged businesses in this nation's economy, and to remedy the ongoing effects of invidious discrimination. These objectives are within the power of Congress under the Spending Power, the Commerce Clause, and the Fifth Amendment, and the means chosen are within the latitude which Congress is given to achieve its objectives. Moreover, Congress has broad power to determine with whom and how it will deal, as well as the terms and conditions upon which to make purchases.

CFLHD's interpretation and implementation of Section 502 was reasonable and is due deference. The requirements of Section 502, as implemented by CFLHD through its adoption of the SCC, are substantially related to the achievement of Congress' objectives.

The Court should give great weight to Congress' decision. Any other result would serve to not only frustrate legitimate Congressional objectives, but would also represent a denigration of Congress' important role as the National Legislature and a co-equal branch of government.

ARGUMENT

I. BENIGN RACE-CONSCIOUS MEASURES MANDATED BY CONGRESS ARE CONSTITUTIONAL

Congress has the power to adopt benign race-conscious measures for remedial or other purposes, *e.g.* to promote diversity or commerce. "[B]enign race-conscious measures mandated by Congress – even if those measures are not 'remedial' . . . are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives." *Metro Broadcasting, 497 U.S. at 564-565; see also, Adarand*, 16 F.3d at 1545. "[R]ace-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by

state and local governments" on account of Congress' role as the National Legislature. *Metro Broadcasting*, 497 U.S. at 565-566. Congress may identify and redress the effects of society-wide discrimination and need not make specific findings of discrimination to engage in race-conscious measures. *Id.* at 565."[I]ts special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. . . . After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." *Fullilove*, 448 U.S. at 502-503 (Powell, J., concurring).

The Court "cannot, in the name of the Constitution, overturn duly enacted statutes simply 'because they may be . . . out of harmony with a particular school of thought.'" *Harris v. McRae*, 448 U.S. 297, 326 (1980). "Whether wisdom or unwisdom resides in the scheme of benefits . . . is not for [the Court] to say. The answer to such inquiries must come from Congress, not the courts." *Helvering v. Davis*, 301 U.S. *619, 644 (1937).*

The considered decision of Congress must be accorded "great weight" even though the legislation may implicate fundamental constitutional rights. *Fullilove*, 448 U.S. at 472-473. The review of the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called on to perform." *Id.* at 472. It is of overriding significance that an agency's action has been specifically approved -- indeed mandated by Congress. *Metro Broadcasting*, 497 U.S. at 563. "[W]hen a program employing a benign racial classification is adopted by an administrative agency at the explicit direction of Congress . . . ." this Court is bound to approach its "task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . General Welfare of the United States' and 'to enforce, by

appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment." *Id.*; *see also Fullilove*, 448 U.S. at 472.

The determination of what actions promote the general welfare is uniquely a congressional decision. *Helvering*, 301 U.S. at 640. In no matter should the Court "pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power." *Fullilove*, 448 U.S. at 480. Likewise, when Congress explicitly or implicitly delegates to agencies the power to elucidate a specific provision of a statute, the resulting action is entitled to deference. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984); see also *Adarand*, 16 F.3d at 1546. "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974); *Chevron*, 467 U.S. at 843.

In achieving its objectives, Congress may employ an "amalgam" of its powers such as the Spending Power, the Commerce Clause, and the Due Process Clause of the Fifth Amendment. *See Fullilove*, 448 U.S. at 473-474. The "use of the moneys of the nation to relieve the unemployed and their dependents is a use for . . . the promotion of the general welfare." *Chas. C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 586-587 (1937). "The reach of the Spending Power, within its sphere, is at least as broad as the regulatory powers of Congress." *Fullilove*, 448 U.S. at 475. Moreover, Congress' power to act under the Commerce Clause is ample and may be used to eradicate discrimination as well as promote commerce. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). "Congress [is] not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong." *Id. at 257. Congress' powers under the Commerce Clause and the Fifth Amendment are unique and broad. Adarand*, 16 F.3d at 1544; *see also Bolling v. Sharpe*, 347 U.S. 497 (1954).

Congress' power to further national policy objectives by conditioning the receipt of federal moneys so as to induce voluntary compliance by the recipients (including prime contractors) with federal statutory and administrative directives is an important tool which has been upheld for more than a century. *See Fullilove*, 448 U.S. at 474-476; *Massachusetts v. Mellon*, 262 U.S. 447 (1923); *McGee v. Mathis*, 71 U.S. (4 Wall) 143 (1866). "[T]he United States . . . does have power to fix the terms upon which its money allotments . . . shall be disbursed." *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 143 (1947). This Congressional power includes the power to adopt legislation and mandate regulations which promote the procurement of services and supplies from small disadvantaged businesses. In so doing, Congress has the necessary latitude to try new techniques, especially where voluntary cooperation is induced by placing conditions on federal expenditures. *Fullilove*, 448 U.S. at 490.

Congressional power is particularly broad where federal government contracts are involved. As the Supreme Court stated in *Perkins v. Lukens Steel*, 310 U.S. 113, 127 (1940):

> Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.

In imposing conditions on expenditures under government contracts, Congress is not exercising "regulatory power over private businesses or employment." *Id.* at 128-129. Rather, Congress is making a legislative determination, pursuant to the Spending Power, that the Government's funds should be used to further the general welfare in a particular manner.

There is a long history of using government contracts to foster anti-discrimination measures. Indeed, the first effort by the Government to affirmatively address the problems of discrimination and disparate treatment of minorities came in an Executive Order issued by President Franklin D. Roosevelt in 1941. Executive Order 8802, 6 Fed. Reg. 3108 (1941). In that Executive Order, which was applicable to government contracts, President Roosevelt established a Fair Employment Practice Commission to govern the employment of minorities by defense contractors.

Over the more than fifty years that have followed, Congress has imposed a series of conditions on expenditures of government contracts to further national objectives. These provisions have been implemented through regulations that are set forth in the Federal Acquisition Regulation (FAR) 41 Parts 19-26 (Socioeconomic Programs). The laws on which these regulations were based were reaffirmed with the passage of the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 4101, Stat. 3243, 3339-40 (1994). In that Act, Congress limited the application of some socioeconomic laws to smaller contracts, *i.e.*, contracts under $100,000, and at the same time Congress retained the full application of socioeconomic provisions to all contracts over $100,000. *Id.*

II. SECTION 502 SERVES THE IMPORTANT GOVERNMENTAL OBJECTIVES OF PROMOTING INTERSTATE COMMERCE AND REMEDYING RACIAL DISCRIMINATION

A. Congress' Adoption of Section 502 was a Considered Decision

Congress' adoption of Section 502 was precisely the type of benign race-conscious decision which is to be accorded great deference and about which Congress should have latitude as to the means by which it chooses to implement its objectives.

The Congress' objectives in adopting Section 502 were clear: to enhance commerce and to remedy the effects of discriminatory practices and similar invidious circumstances by promoting the business development of small disadvantaged businesses in order to bring such concerns into the nation's economic mainstream, and by improving the opportunities for such concerns through the federal procurement process. *See* Joint Explanatory Statement of the Committee of Conference, House Conf. Rep. No. 100-1070, 2d Sess. 73 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5485. Such objectives are within Congress' unique and broad amalgam of powers to provide for the federal welfare, to regulate interstate commerce and to enforce the guarantees of the Fifth Amendment.

Section 502 is an integral part of Congress' ongoing small business development program which is implemented through Section 8(a) (the "Minority Small Business and Capital Ownership Development Program")[1] and Section 8(d) (the "Minority Smali Business Subcontracting Program")[2] of the Small Business Act and is designed to guide federal procurement decisions towards small and small disadvantaged businesses. *See* Senate Rep. No. 100-394, 2d Sess. 1-2 (1988) *reprinted in* 1988 U.S.C.C.A.N. 5402-5403. The program is a bipartisan effort evolving from Executive orders[3] issued by Presidents Johnson

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[1] The 8(a) program authorizes the Small Business Administration to enter into various contracts with other federal departments and agencies and to then "subcontract" the contracts to small disadvantaged businesses. 15 U.S.C. § 637(a).

[2] The 8(d) program obliges prime contractors on major federal contracts to maximize minority participation.

[3] These were not the first Executive Orders dealing with the affirmative action responsibilities of government contractors and subcontractors. Previous Executive Orders dealing with the obligations of government contractors and subcontractors were as follows: President Roosevelt: Exec. Order No. 8802, 3 C.F.R. 957 (1941); Exec. Order No. 9001, 3 C.F.R. 1054 (1941);

and Nixon[4] in response to the finding of the 1967 Report of the Commission on Civil Disorders ("Kerner Commission Report") that disadvantaged individuals did not play an integral role in America's free enterprise system because, *inter alia*, they enjoyed no appreciable ownership of small businesses. Senate Rep. No. 95-1070, 2d Sess. 15, *reprinted in* 1978 U.S.C.C.A.N. 3849. The program was given a statutory basis in 1978 when Congress adopted Public Law 95-507. Act of Oct. 24, 1978, Pub. L. No. 95-507, 92 Stat. 1770. Describing its intent, Congress stated:

> This chapter gives a statutory basis to the 8(a) program. It establishes the policy goal of developing businesses owned by socially and economically disadvantaged persons. It also recognizes the pattern of social and economic discrimination that continues to deprive racial and ethnic minorities, and others, of the opportunity to participate fully in the free enterprise system. The bill is designed to foster business ownership by socially and economically disadvantaged persons and to promote the viability of businesses run

Exec. Order No. 9346, 3 C.F.R. 1280 (1943); President Truman: Exec. Order No. 10,210, 3 C.F.R. 390 (1951); Exec. Order No. 10,227, 3 C.F.R. 739 (1951); Exec. Order No. 10,231, 3 C.F.R. 741 (1951); Exec. Order No. 10,243, 3 C.F.R. 752 (1951); Exec. Order No. 10,281, 3 C.F.R. 781 (1951); Exec. Order No. 10,298, 3 C.F.R. 828 (1951); Exec. Order No. 10,308, 3 C.F.R. 837 (1951); President Eisenhower: Exec. Order No. 10,479, 3 C.F.R. 961 (1953); Exec. Order No. 10,557, 3 C.F.R. 218 (1954); President Kennedy: Exec. Order No. 10,925, 3 C.F.R. 443 (1961), 5. U.S.C. § 631 (1964); Exec. Order No. 11,114, 3 C.F.R. 774 (1963), 5 U.S.C. § 631 (1964); President Johnson: Exec. Order No. 11,246, 3 C.F.R. 339 (1965), 42 U.S.C. § 2000e (Supp. V. 1970); Exec. Order No. 11,375, 3 C.F.R. 320 (1967), 42 U.S.C. § 2000e (Supp. V. 1970).

[4] The most notable of these early efforts was President Richard Nixon's "Philadelphia Plan" which was promulgated under the authority of Executive Order No. 11,246.

> by such persons by providing contract, financial, technical and management assistance.

Senate Rep. No. 95-1070, *supra,* at 3849.

Section 502, adopted as § 221(g) of Public Law 95-507, required federal agencies, in consultation with the Small Business Administration ("SBA"), to establish realistic goals for the participation of disadvantaged businesses in federal contracts. *Pub. L. No. 95-507,* 92 Stat. 1770 (codified at 15 U.S.C. 644(g)(2) (Supp. 1994)), *see also,* House Conference Rep. No. 95-1714, 2d Sess. 27, *reprinted in* 1978 U.S.C.C.A.N. 3887.[5]

In 1988, concerned that "another legislative overhaul was critical," Congress again amended various sections of the Small Business Act and expanded the obligations of federal agencies under Section 502. Business Opportunity Development Reform Act of 1988. Pub. L. No. 100-656, 102 Stat. 3853 ("1988 Reform Act"); *see also* Senate Rep. No. 100-394, *supra,* at 5406.[6] Congress determined that the SBA's minority small business assistance program was a primary catalyst for including small disadvantaged business concerns in the nation's economic mainstream *(Id.* at 5465); that among the problems faced by small disadvantaged business concerns was inadequate support by federal agencies in terms of the number, dollar value and diversity of contracts offered to support these businesses *(Id.* at 5465-5466); and that substantial reforms were imperative if "Congressional mandated business development objectives and purposes" were to be achieved *(Id.* at 5486).

[5] The Section 8(a) program was described only in SBA Standard Operating Procedures prior to the enactment of Public Law 95-507. *See* Senate Rep. No 100-374, *straw* at 1. Congress further amended the SBA's minority business program in 1980 when it adopted Public Law 96-481. Id. at 5404.

[6] The 1988 Reform Act was introduced in the Senate as S. 1993. The House Companion Bill was H.R. 1807.

Section 502 was amended to provide for Presidentially-established annual Government-wide procurement contract goals of not less than twenty percent for small business concerns[7] and five percent for disadvantaged businesses;[8] and to mandate that federal agencies establish annual goals that presented "the maximum practicable opportunity for small and small disadvantaged businesses" which should be not less than the Government-wide goal. 15 U.S.C. §644(g)(1).[9] These goals may be waived. Section 503 was amended to require that the SBA compile and analyze annual reports from procuring agencies with regard to their annual goals. 15 U.S.C. 644(h); *see also* House Conf. Rep. No. 100-1070, *supra,* at 5507. The goals established by Congress were consistent with the existing Department of Defense five percent goal for small disadvantaged businesses and would broaden that goal to government-wide procurement activity. *Id.* at *5507.*

Congress has also adopted other race-conscious mandates through authorization or appropriation measures for: defense *(see* the National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, 103 Stat. 1352); public works *(see* the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116, upheld in *Fullilove);* transportation *(see* the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17 101 Stat. 132); and banking

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[7] The Petitioner does not appear to contest the goal as it applies generally to small business concerns.

[8] Initially, Senate Bill 1993 provided that for fiscal year 1994 and thereafter the goal for small businesses would be twenty percent, and for small disadvantaged businesses ten percent. Sen. Rep. No. 100-394, *supra,* at 5476. The goal for small disadvantaged businesses was reduced before passage of the Act.

[9] The existing Section 502 was redesignated as paragraph 2 and is currently codified as 15 U.S.C. § 644(g)(2) (Supp. 1994).

(see the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183).

Although the small disadvantaged business program does have a racial component, the program is not primarily based on race, but on size and disadvantage. "These groups may include, not only persons of minority racial or ethnic origin, but also groups such as veterans." Problems Facing Minority and Women Owned Small Businesses, Including SBA Section 8(A) Firms, in Procuring U.S. Government Contracts: An Interim Report, Twenty-Third Report by the Committee on Government Operations (November 29, 1994) p. 2 ("House Interim Report"). The program focuses on business development for all socially and economically disadvantaged individuals, regardless of race or gender. *Adarand,* 16 F.3d at 1541.[10] Congress stated from the outset that

> "[a]lthough it is expected that, as under the present 8(a) program, the majority of qualifying firms will be those owned and operated by racial and ethnic minorities, the program will be open to any business owned by persons who meet the socially and economically disadvantaged test."

House Conf. Rep. No. 100-1070, *supra,* at 3849.

B. Congress had Abundant Evidence to Support the Enactment of Section 502

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[10] "Socially disadvantaged individuals are those who have been subjected to racial or *ethnic prejudice or cultural bias* because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5) [emphasis added]. These individuals must also show that economic disadvantages have diminished their capital and credit opportunities, and have precluded or are likely to preclude such individuals from successfully competing in the open market. 15 U.S.C. § 637(a)(6)(A). Racial minorities may be denied certification, and non-minorities granted certification. *See* 49 C.F.R. Pt. 23, Subpt. D, App. C.

Following a "familiar legislative pattern," Congress had accumulated "abundant evidence" to support the enactment of Section 502. *See Fullilove,* 448 U.S. at 474, 477-478. From 1971 through 1987, various committees of the House of Representatives held fourteen hearings on the topic of the development of small minority or disadvantaged businesses and the role of the Congress and federal agencies. *See* Appendix A, List of Hearings in the House of Representatives. In 1988, the Senate Committee on Small Business conducted the first national study of firms that had graduated from the Minority Business Capital Ownership and Development Program. Senate Rep. No. 100-394, *supra,* at 5405. The same Senate Committee also held five hearings on the 1988 Reform Act, *id.* at 5417-5424, while the House Subcommittee on Procurement, Innovation and Minority Enterprise Development held six hearings, and the full House Committee on Small Business held one hearing on the 1988 Reform Act. *Id.* at 5417-5418.

During these hearings, Senator Kerry testified as to the great disparity between the number of firms designated as 8(a) firms and the number that were granted federal contracts, with the result that in 1986 minority businesses received "a mere 2.4%" of the total federal procurement dollars. Minority Business Development Reform Act of 1987: Hearings on S. 1993 and H.R. 1807 Before the Senate Committee on Small Business, 100th Cong., Sess. 8 (1988). Senator Sasser testified:

> Minorities are still less likely to own a small business. Some 1.8 percent of the minority population owned a business in 1982 compared with 6.4 percent of all business owners. Moreover, minority-owned firms are smaller than nonminority businesses with lower sales and fewer employees. . . . The question of minority business ownership is one that demands continued attention by this committee and by the entire Congress. . . . These hearings and the Chairman's legislative proposal, . . . are an effort to get the 8(a) program to focus on its original statutory objective. That objective is simple enough -- to boost minority ownership of small businesses that can compete in a competitive market.

Hearings on S. 1993 and H.R. 1807, *supra,* at 15-18.

During Congressional debates on the 1988 Reform Act, Congressman Conte stated that the statistical disparity between the number of minority-owned firms capable of doing business with the Federal Government and the percentage of Government procurement dollars they received, demonstrated the need for continued support of small disadvantaged businesses. 134 Cong. Rec. 30057 (1988). Senator Weiker, who described the conferees agreement regarding the five percent Government-wide goal, noted that a "perennial problem for the 8(a) Program has been getting a flow of contracts from all procurement agencies to make the concept [of strengthening small disadvantaged businesses] work." 134 Cong. Rec. 31493 (1988).

In its report, the Senate Committee on Small Business indicated that:

> Title VI [15 U.S.C. 644(g)(1)] of the bill (the 1988 Reform Act) establishes ambitious procurement goals for small business and minority-owned small business. The Committee strongly believes that the procuring agencies must aggressively provide new and meaningful contracting opportunities for small and minority-owned firms. For ease in contract administration, federal agencies are placing greater reliance on larger and consolidated contracts. This trend is making it more difficult for small businesses to successfully bid on contracts. Federal agencies, through the effective use of subcontracting plans and breakout programs, can provide new contract opportunities for small firms. The Committee is convinced that both the

taxpayer and the government will win by an increased degree of small business participation in the federal procurement process. . . .

With respect to businesses owned by socially and economically disadvantaged individuals, the legislation sets a five percent contract award objective. This five percent goal includes both prime and subcontracting opportunities for minority-owned firms. According to the best available data in Fiscal Year 1987, only 3.1 percent of the federal procurement prime subcontracting awards were performed by minority businesses.

Section 1207 of the Department of Defense Authorization bill for Fiscal Year 1988 set a five percent minority business goal for that agency. Despite problems in implementing the program, the Committee believes the five percent goal to be a commendable one that should be attainable government-wide. The Committee recognizes the challenges involved in meeting this ambitious objective. This five percent goal should not be achieved by merely shifting contracts previously set aside for small businesses to minority firms. Instead, federal agencies should increase the slice of the federal procurement pie for minority firms. This goal can be achieved through a variety of techniques. . . .

Id. at 5456-5458.

Further, based on its prior experience, Congress was quite cognizant of the important role that minority and disadvantaged

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[11] In introducing Senate Bill 1993, Senator Bumpers stated that:

minority-owned small businesses make up an important part of our Nation's economic framework. These firms have played an especially important role in revitalizing depressed areas that would otherwise be dependent upon millions of Federal dollars for economic recovery .

Id. at 5414.

businesses play in the economy,[11] and the negative effects upon interstate commerce arising from racial discrimination and other invidious practices.[12] Its specific findings respecting the

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[12] In *Fullilove*, this Court acknowledged that one year before the adoption of Public Law 95-507 "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." *Fullilove*, 448 U.S. at 477-478.

[13] Specifically, Congress has found:

(A) that the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons and improve the functioning of our national economy;

(B) that many such persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control;

(C) that such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian Tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities;

(D) that it is in the national interest to expeditiously ameliorate the conditions of socially and economically disadvantaged groups;

(E) that such conditions can be improved by providing the maximum practicable opportunity for the development of small business concerns owned by members of socially and economically disadvantaged groups.

(F) that such development can be materially advanced through the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from such concerns; and

(G) that such procurements also benefit the United States encouraging the expansion of suppliers for such procurements, thereby encouraging

SBA's small business development programs are numerous.[13] These conclusions provide an additional basis for Section 502 (*e.g* discriminatory conditions "can be improved by providing the maximum practical opportunity" for the development of small disadvantaged businesses, 15 U.S.C. §631 (f)(i)(E) (Supp. 1994), and "such development can be materially advanced through the procurement by the United States of articles, equipment, supplies, *services, materials, and construction work from such concerns," 15 U.S.C. §* 631(f)(i)(F) (Supp. 1994) [emphasis added]). Given the exhaustive legislative record, this Court should defer to Congress' judgment.

III. THE SCC AS UTILIZED BY CFLHD IS SUBSTANTIALLY RELATED TO THE ACHIEVEMENT OF CONGRESS' OBJECTIVES

The CFLHD's SCC clause was adopted in 1979 pursuant to Public Law 95-507, which accorded agencies broad discretion to implement the goals of the Small Business Act. *Adarand,* 16 F.3d at 1545. Developed as a means to increase disadvantaged business enterprise participation in Direct Federal contracts, the SCC was found to be a "good approach. . . preferred over noncompetitive methods" because it: (1) was less costly, (2) was a more realistic and rational approach to developing disadvantaged businesses since assistance was provided and assistance gained through established highway construction contractors who were reimbursed for their efforts, and (3) permitted disadvantaged businesses to develop closer and lasting relationships with highway contractors. *See* Appendix B Federal Highway Administration, Evaluation of Subcontracting Compensation Clause, pp. B-4 - B-5 (October 1985).

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competition among such suppliers and promoting economy in such procurements.

15 U.S.C. §631(f)(1) (Supp. 1994).

Compliance is voluntary. The SCC encourages, but does not require, the utilization of disadvantaged businesses through the use of "innovative incentives" which permit general contractors to make rational economic decisions. *Id.* Its impact is limited to subcontractors who, in any event, have no firm expectation that they will be hired. It is not a constitutional defect that a race-conscious program may disappoint an expectation of a non-minority firm, particularly where that expectation is at best speculative. *Fullilove,* 448 U.S. at 484;[14] *Perkins,* 310 U.S. at 127 ("Government enjoys the unrestricted power to determine those with whom it will deal . . . .") The SCC is narrowly tailored and is not over-inclusive because annual certification of disadvantage is required, and such certification is open to all disadvantaged businesses. *Adarand,16* F.3d at 1540, 1547. The SCC is also typical of federal regulations which set "terms and conditions upon which [the Government] will make needed purchases." *Perkins,* 310 U.S. at 127.

In enacting Section 502, Congress explicitly chose agencies such as CFLHD as the "instrumentalities" by which its objectives were to be effectuated. The CFLHD followed Congress' precise directions "to provide a means to ensure '*the maximum practicable opportunity*' for disadvantaged small business participation in federal procurement." *Adarand,* 16 F.3d. at 1545. Congress could have, but has not chosen to limit the SCC program; instead in 1988 Congress amended Section 502 to encourage the further development of similar programs.

The small disadvantaged business program is constantly being reviewed by Congress and has been consistently amended to adjust to current circumstances, *e.g.*, the 1988 Reform Act, a

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[14] Likewise, in the context of interstate commerce the fact that "an otherwise valid regulation causes some business to shift from one interstate supplier to another" is not determinative. *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 127 (1978).

"critical overhaul" needed. *Cf. Metro Broadcasting*, 497 U.S. at 594. Since 1988, Congress has conducted periodic hearings on the 8(a) and 8(d) programs. As an example, on November 29, 1994, the House Committee on Government Operations issued an interim report on "Problems Facing Minority and Women-Owned Small Businesses, Including Section 8(A) Firms, In Procuring U.S. Government Contracts." House Interim Report, *supra*. The Committee concluded:

> Minorities confront a number of problems in creating successful small businesses. According to testimony from the subcommittee's July 12 hearing, minorities have had fewer opportunities to develop business skills and attitudes, to obtain necessary resources, and to gain experience, which is necessary for the success of small businesses in a competitive environment. This lack of opportunity occurs primarily because of discriminatory or economic conditions. Hence, it is no surprise that minority business ownership rates lag significantly behind those of nonminorities, and many predominantly minority communities are desperately short of employment opportunities created by small businesses.
>
> Improving access to government contracts and procurement offers a significant opportunity for business development in many industry sectors. . . .

Id. at 5 [footnote omitted]. With regard to discrimination in the construction industry the Committee found:

> [T]here is underlying discrimination against new entrants into the construction field. This is because bonding firms owned by several generations of the same families seem to predominate; and such firms tend to give performance and payment bonds to people they already know and not to the new business person, especially if the small business owner is a woman or of a racial or ethnic minority.

Id. at 14. The Committee also cited with approval the 1992 Final Report of the U.S. Commission on Minority Business Development to the effect that:

> Minority business development efforts are not social programs; they are investments in America's economic system and in its future. Even if we place considerations of equity and historic discrimination aside, it makes absolutely no economic sense to squander more than 2 percent of the nation's most precious resource-human talent-and foster, in effect, practices that primarily focus minorities to be consumers rather than producers of wealth.

Id. at 5.

> Moreover, since this Court's decision in *Croson* there have been no fewer than four Congressional hearings addressing ongoing marketplace discrimination and the need for Congress to remedy such discrimination. Testimony was presented at these hearings by minority business owners from diverse regions of the country in various categories of business including construction, goods, and services. Witness testimony uniformly reflected ongoing marketplace discrimination and heightened barriers and denial of market access.[15]

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[15] Those hearings were as follows: March 14, 1990 U.S. House of Representatives, Committee on Operations, Hearings on *Richmond v. Croson*; May 16, 1990, Hearings on S. 1235, Before U.S. Senate Committee on Governmental Affairs; and August 1, 1990, Hearings to Assess Impact of *City of Richmond v. J.A. Croson* on Minority Small Business Participation Before U.S. Senate Small Business Committee's Subcommittee on Urban and Minority-Owned Business Development.

Under the circumstances, CFLHD's decision was reasonable and entitled to great deference. *See Chevron*, 467 U.S. at 843-844.

CONCLUSION

For the reasons stated herein, the decision of the court of appeals should be affirmed. Section 502 of the Small Business Act serves the important governmental objectives of promoting commerce and remedying discrimination, which are clearly within the power of Congress. Both Section 502 and the SCC, as implemented by the CFLHD at Congress' direction, are substantially related to the achievement of these objectives.

A contrary result would improperly limit Congress' role as a co-equal branch and create a potential constitutional crisis. Congress' actions here have their primary source in the Fifth Amendment, Spending Clause and the Commerce Clause. Any derogation of Congress' authority would have a serious impact on its ability to act in not only the human rights field, but also in its regulation of commerce, and promotion of the general welfare.

This is a classic instance involving those broad, complex and sensitive issues of national policy which are best resolved by Congress. Congress must have its "choice of instrumentalities to perform a function within its power." *Fullilove*, 448 U.S. at 480. If the decision of the court of appeals is not affirmed, Congress' power to delegate to administrative agencies would be impaired such that Congress would retain little latitude to establish broad policy objectives, and to rely upon administrative agencies for the formulation of policy and the making of rules to fill any remaining gap. Congress cannot effectively legislate on a case by case basis. As the National Legislature, it must be able to address issues on a society-wide basis with the support of the flexibility, narrow-tailoring, and expertise afforded by agency involvement.

The relationship among the branches of government is, like this Court's analysis, a "grave" and "delicate" matter which is due great deference. In the past this Court has recognized that Congress' authority to promote commerce and remedy discrimination through the states is not subject to strict scrutiny. It follows that Congress' authority to do likewise through federal spending should be subject to no greater scrutiny. This Court should adhere to its prior decisions in *Metro Broadcasting* and *Fullilove*.

Respectfully submitted,

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APPENDIX A

LIST OF HEARINGS OF THE

U.S. HOUSE OF REPRESENTATIVES

APPENDIX A

1) Hearings before the Subcommittee on Minority Small Business Enterprise of the Select Committee on Small business, House of Representatives, Ninety-Second Congress, First Session, Pursuant to H. Res. 5 and 19. Washington, D.C., July 27, designed to promote minority enterprise and effectiveness; also created a permanent select committee to conduct studies and investigation of the problems of minority small business. (U.S. Government Printing Office, Washington: 1972).

2) Hearings before the Subcommittee on Minority Small Business Enterprise of the Select Committee on Small Business, House of Representatives, Ninety-Second Congress, H. Res. 5 and 19, Resolutions creating a permanent select committee to conduct studies and investigations of the problems of small business, Volume 2, Washington, D.C., April 25, 26, and 27, 1972 (U.S. Government Printing Office Washington: 1972); a Report of the Subcommittee on Minority Small Business Enterprise to the Select Committee on Small Business, House of Representatives, Ninety-Second Congress, pursuant to H. Res. 5 and 19 with findings and conclusions in creating a permanent select committee to conduct studies and investigations of the problems of small and minority businesses. (U.S. Government Printing Office, Washington: 1972).

3) Hearings before the Subcommittee on Minority Small Business Enterprise and Franchising of the Permanent Select Committee on Small Business, House of Representatives, Ninety-Third Congress, Washington, D.C., October 3 and 4, 1973. Examined the various minority enterprise programs of federal departments and agencies designed to promote minority enterprise development (U.S. Government Printing Office, Washington).

4) Hearings before the Subcommittee on Minority Small Business Enterprise and Franchising of the Permanent Select Committee on Small Business, House of Representatives, Ninety-Third Congress, Washington, D.C., March 21, 1974. Continuing examination of government minority enterprise programs (U.S. Government Printing Office, Washington: 1974).

5) Hearings before the Subcommittee on SBA Oversight and Minority Enterprise of the Committee on Small Business, House of Representatives, Ninety-Fourth Congress, Washington, D.C., July 8, 9, 10, 1975. Examined minority enterprise and allied problems of small business. U.S. Government Printing Office, Washington: 1975); a Report of the Subcommittee on SBA oversight and Minority Enterprise of the Committee on Small Business, House of Representatives, Ninety-Fourth Congress, September 10, 1975. Examined minority enterprise and allied problems of small business. (Government Printing Office, Washington: 1975).

6) Joint Hearing before the Select Committee on Small Business, United States Senate and the Subcommittee on Minority Enterprise and General Oversight of the Committee on Small Business, House of Representatives, Ninety-Fifth Congress, February 6, 1978. Examined minority contracting. (U.S. Government Printing Office, Washington: 1978): Hearing before the Subcommittee on Minority Enterprise and General Oversight of the Committee on Small Business, House of Representatives, Ninety-Fifth Congress, Washington, D.C., May 15, 1978. Examined business opportunities for minority forms with federally-aided railroads. (U.S. Government Printing Office, Washington: 1978)

7) Hearings before the Task Force on Minority Enterprise of the Subcommittee on General Oversight and Minority

enterprise of the Committee on Small Business, House of Representatives, Ninety-Sixth Congress, Second Session, Washington, D.C., March 31, 1980. Among the issues examined were the under-utilization and discrimination against minorities in the transportation industry. (U.S. Government Printing Office, Washington: 1980); Hearings before the Subcommittee on General Oversight and Minority Enterprise of the Ninety-Sixth Congress, Washington, D.C., June 9 and 16, 1980. Among the issues examined were the need for federal administrative support for minority business development activities, including equity financing of minority business and minority business management education. (U.S. Government Printing Office, Washington: 1980); Hearings before the Task Force on Minority Enterprise of the Subcommittee on General Oversight and Minority Enterprise of the Committee on Small Business, House of Representatives, Ninety-Sixth Congress, Anchorage, Alaska, July 16 and 17, 1980. Examined minority business participation in federal programs in Alaska, with such projects as the Alaskan-Canadian National Gas Transportation Project. (U.S. Government Printing Office, Washington: 1980).

8) Hearings before the Committee on Small Business, House of Representatives, Ninety-Seventh Congress (Phoenix, AZ, September 1, 1981; and Atlanta, GA, January 18, 1982); Hearings before the Committee on Small Business, House of Representatives, Ninety-Seventh Congress, Los Angeles, CA, July 7; Chicago, IL, July 18, 1981. Examined how in the decade of the 80's, racism and other barriers to the free enterprise system have placed a heavier burden on the development and maturity of minority businesses.

9) Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Committee on Small Business, House

of Representatives, Ninety-Seventh Congress, Washington, D.C., June 16, 1982. Examined official governmental conduct that impedes the growth and development of minority and small business. (U.S. Government Printing Office, Washington: 1982); Hearing before the Committee on Small Business, House of Representatives, Ninety-Seventh Congress, Philadelphia, PA, March 15, 1982 Examined the impact of new policy directions on small and minority business; A Report issued by the Committee on Small Business, House of Representatives, Ninety-Seventh Congress; examined minority business development efforts of the Small Business Administration (Report No. 97-959) Dec. 10, 1982), (U.S. Government Printing Office, Washington: 1982); A Report of Ninety-Seventh Congress, (Report No. 97-976). Examined small and minority business ownership in the cable television industry (Dec. 17, 1982) (U.S. Government Printing Office, Washington: 1982).

10) Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Committee on Small Business, House of Representatives, Ninety-Eighth Congress, Washington, D.C., April 5, 1984. Among the issues examined was the availability of subcontracting opportunities with major prime contractors; Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Committee on Small Business, House of Representatives, Ninety-Eighth Congress, Washington, D.C., April 10, 1984. Examined small and minority business subcontracting programs; Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Committee on Small Business, House of Representatives, Ninety-Eighth Congress, Washington, D.C., April 25, 1984. Examined small and minority business

subcontracting programs; Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems, of the Committee on Small Business, House of Representatives, Ninety-Eighth Congress, Washington, D.C., June 21, 1984. Examined barriers to minority business in subcontracting programs; Hearings before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Committee on Small Business, House of Representatives, Ninety-Eighth Congress, Washington, D.C., June 28, 1984. Examined barriers to minority business in subcontracting and General Small Business Problems of the Committee on Small Business, House of Representatives, Ninety-Eighth Congress, Washington, D.C., September 19, 1984. Examined problem areas confronting disadvantaged business enterprises that impede their growth and development of new and existing firms in the construction industry. (U.S. Government Printing Office, Washington: 1984); Hearing before the Committee on Small Business, House of Representatives, Ninety-Eighth Congress, Oakland, CA, November 28, 1984. Examined minority participation in the Small Business Administration's development programs. (U.S. Government Printing Office, Washington: 1985).

11) Hearings before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Committee on Small Business, House of Representatives, Washington, D.C., April 17 and June 5, 1985. Examined structured impediments to minorities in construction and transportation projects; Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Committee on Small Business, House of Representatives, Ninety-Ninth Congress, Washington, D.C., October 22, 1985. Examined the progress of Congressional initiatives

to eliminate problems and barriers that impede the emergence and growth of disadvantaged business enterprises.

12) Hearings before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Committee on Small Business, House of Representatives, Ninety-Ninth Congress, Santa Fe, NM, September 8, 1986 (U.S. Government Printing Office, Washington: 1987). Examined minority enterprise and general small business problems. (U.S. Government Printing Office, Washington).

13) Hearing before the Subcommittee on Procurement, Innovation, and Minority Enterprise Development of the Committee on Small Business, House of Representatives, One Hundredth Congress, Washington, D.C., August 4, and October 7, 1987. Examined methods of strengthening federal support for minority business development; Hearing before the Committee on Small Business, House of Representative, One Hundredth Congress, Washington, D.C., September 29, 1987 (U.S. Government Printing Office, Washington: 1988). Examined methods of strengthening federal support for minority business development.

Source: Testimony of Parren J. Mitchell, Chairman Minority Business Enterprise Legal Defense and Education Fund, Before the U.S. Senate, Subcommittee on Urban and Minority-Owned Business Development of the Senate Small Business Committee, 428-A Russell Senate Building, Washington, D.C., Wednesday, August 1, 1990.

APPENDIX B

List of Congressional Hearings

Federal Highway Administration, Evaluation of

Subcontracting Compensation Clause (October 1985)

OFFICE OF DIRECT FEDERAL PROGRAM

WASHINGTON, D.C.

EVALUATION OF DIRECT FEDERAL'S DBE SUBCONTRACTING COMPENSATION CLAUSE

FISCAL YEARS:

1982

1983

1984

1985

FEDERAL HIGHWAY ADMINISTRATION

OCTOBER 1985

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I. Purpose of Review

As a means to increase Disadvantaged Business Enterprise (DBE) participation in Direct Federal contracts, the continued use of the Subcontracting Compensation Clause (SCC) appears to be a good approach. The SCC is preferred over noncompetitive methods because it: (1) appears to be less costly; (2) is a more realistic and rational approach in developing DBE's since assistance is provided and experience is gained through an established highway construction contractor who does get reimbursed for his training effort; and (3) develops closer and lasting business relationships with highway contractors.

This report will serve to fulfill managements desire to determine and document savings, if any, of using the SCC over 8(a) negotiated procurements for meeting imposed DBE goals. In addition to costs, its overall effectiveness was reviewed, including the encouraging of DBE subcontract participation and the providing of assistance to the DBE.

II. Background

For over 14 years, the Federal Highway Administration's (FHWA) Direct Federal Program has been taking affirmative steps to increase disadvantaged business enterprise (DBE) participation in highway construction.

Beginning in FY 1979, Direct Federal undertook a program which would place more responsibilities on the contractors for DBE participation and, in turn, reimburse prime contractors for their expenses incurred for locating, developing, and training disadvantaged firms. Each division developed experimental specifications to provide compensation

to the prime contractor for accomplishing these tasks. The experimental specifications all included a payment percentage applied to the amount subcontracted to DBE's. After this initial experience, the SCC's were refined and various clauses evolved, they included: (1) threshold percentages of work to DBE subcontractors that must be exceeded to become eligible for compensation; (2) maximum percentages of the contract amount which limited the total payment to the prime contractors; (3) provisions for increasing contract time; and (4) criteria for DBE certification. Initial use of the SCC began in FY 1980.

On February 5, 1981, the Direct Federal Program Administrator (DFPA) transmitted a three part Direct Federal policy to the divisions to provide DBE's and women-owned business enterprises (WBE) maximum opportunity to participate in Direct Federal construction and procurement of commodities and services. The first part of this policy is to seek out and encourage DBE/WBE firms to bid independently as a prime, subcontractor, or supplier for Direct Federal projects. The second area of emphasis is to encourage DBE/WBE subcontracting through use of innovative incentives such as the SCC. The third area for encouraging DBE/WBE participation is through Direct Federal use of the Small Business Administration's (SBA) 8(a) program. With this policy, increased emphasis was placed on Direct Federal's DBE subcontracting.